No. 14405

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN,
Appellees

APPELLEES' PETITION FOR REHEARING

SNELL & WILMER
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TABLE OF AUTHORITIES CITED

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Come now Robert V. H. Sugden and Jean S. Sugden, appellees herein, and present this, their petition for rehearing in the above entitled cause, and in support thereof, respectfully show:

I

Appellees, pursuant to the rule as laid down by the Supreme Court in the *Goldstein case* as interpreted by the Second Circuit in the *Coplon case,* clearly established that substantial evidence condemned as illicitly obtained by the test as to illegality established by the Court in its opinion rendered herein was employed by the Government before the Grand Jury in securing the indictments quashed by the District Judge and in preparing its case against appellees; and further, that it would use such evidence on the trial of the cause. These facts appearing to the satisfaction of the

District Judge the burden fell upon the Government to satisfy the District Judge:

(a) That the indictments were untainted by the use of such unlawful evidence;

(b) That such evidence, so unlawfully obtained, did not play any substantial part in building the Government's case, directly or indirectly;

(c) That the evidence which the Government proposed to offer on the trial of the cause sprang from independent sources untainted by and not traceable to such unlawful interception and divulgence.

U. S. vs. Goldstein, 62 S. Ct. 1000, 316 U.S. 114, 86 L. ed. 1312

U. S. vs. Coplon, 185 F. 2d 629, *Certiorari denied* 72 S. Ct. 362, 342 U.S. 920, 96 L. ed. 690

Accepting for the purpose of this argument the distinction drawn by this Honorable Court between communications sent by an unlicensed operator and a licensed operator, it is clear that there were two recordings made by Stratton, one when the operator's permit was in effect, one when such permits were only applied for. *The Government knew which of these transcriptions it had employed in building its case and in obtaining these indictments. It knew which of these it proposed to use on the trial of the action. These appellees were not so advised.*

The rule which the Court here declares as to the effect of the lack of a proper license had been theretofore declared by the Ninth Circuit in *Casey vs. U. S.,* 191 F. 2d 1, and was known to the Government.

Yet the Government made no effort or offer to show that the indictments were untainted by this unlawful evidence or that it

could proceed with lawful evidence arising from a lawful source.

Indeed, Stratton testified that he did in fact relate the entire interception procedure to the Grand Jury:

"A. Well my testimony was a running account of what had happened from the time we were first called in on the case." (T.R. 40)

* * * * * * * * *

"Q. Other than testifying how you went about doing your monitoring, that is, describing your various steps in setting up your equipment, and that sort of thing, the balance of your testimony related to the substance of the conversations which you had intercepted through your monitoring equipment?

"A. That is correct, the general use of the radio in that particular case." (T.R. 41)

How can the District Judge remove this taint from the indictment; how can he ascertain what effect the unlawful testimony had upon the minds of the Grand Jurors?

The ruling is in conflict with both *Goldstein,* supra, and *Coplon,* supra.

II

Our inadequate presentation of the proposition that the Federal Judiciary will not countenance any "dirty business' in or about the administration of federal justice we believe caused the Court to overlook this sound reason for the action of the District Judge.

May we very briefly point to these facts:

(a) Stratton's purpose in coming to Arizona was to "wire tap" radio communications of appellees at the behest of the Department of Justice on complaint of the Immigration Serv-

ice, the substance at least of which "tapped" conversations was promptly disclosed to the Immigration Service followed by a full divulgence of the two recorded "tappings"; (T.R. 39, 38)

"Q. When was the first time that these conversations, if I may call it as such, were delivered to the Immigration Service?

"A. There was probably a copy under confidential cover of each one within a day or two after the transcript was made.

"Q. During the course of your visit here, your various visits here, Mr. Stratton, did you work with the Immigration Service in the sense of—I mean, you were in contact with the Immigration Service there at Yuma?

"A. Well, in the sense that I stopped by the office on my way to Yuma. We don't have any radio contact. We weren't on the same frequency.

"Q. You did see them during the time you were there at various times?

"A. Yes, I was ordered to on my first trip, because, obviously, the complaint was on the basis of their complaint.

(b) The purpose of the "wire tapping" was not to ascertain if an unlicensed station was operating or if unlicensed operators were transmitting or if an unassigned frequency was being employed; the purpose was to, in cooperation with the Department of Justice and in direct defiance of said Section 605, intercept and divulge communications *without reference to or regard for* whether the station or the operators were licensed or unlicensed. Indeed, in the course of the "wire tapping" procedures operators' licenses were issued to appellees, so plainly the Federal Communications Commission and its officials were not concerned with this phase of appellees' activities.

(c) Since licenses are not required for the operation of the mobile end of the communications equipment, at least one party to the intercepted conversations was not in the category of an unlicensed operator at all times.

Weighing then in the balance of propriety the simple oversight of the appellees to obtain a "perfunctory permit" against the purposeful, deliberate flouting of a statute of the United States (a criminal offense, if you please) and the denunications of our Supreme Court of "dirty business" in law enforcement, can it be said a Federal Court should countenance such conduct by, in effect, condoning it?

This is not evidence stumbled upon in the course of a lawful discharge of duties imposed by law upon the Federal Communications Commission; *this is evidence purposefully sought out in direct defiance of law.* Would it be said that because one operating an unlicensed motor vehicle upon the highway without an operator's license thereby becomes subject to unlawful search and seizure because he is unlawfully upon the highway and has no right to be driving the vehicle? Would the Government contend the police authorities might arbitrarily stop all motorists and search their vehicles with the legality of such action turning upon the chance of the presence or absence of a driver's license in each instance?

". . . Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

* * * * * * * * *

"For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence.

> It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others. That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong."
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> *Nardone vs. U. S.,* 82 L. ed. 314, 317, 318, 302 U.S. 379

The fact that appellees may not have had "perfunctory" operators' licenses for a portion of the time when the "wire tapping" was going on does not change the fact that the indictments returned herein and the Government's case rest upon evidence gained "through resort to methods deemed inconsistent with ethical standards and destructive of personal liberty"—through a practice " . . . which involves a grave wrong."

Does the "perfunctory" odor of a technical oversight blot out, override and dissipate the stench of a purposeful flouting of the declared public policy of our land, declared not only by our Congress but reaffirmed by our Supreme Court?

We respectfully urge this Honorable Court has overlooked the basic underlying principle which condemns a practice such as here indulged in by the Government; has overlooked the fact that a mere technical omission of these appellees cannot make something morally right which in its very essence is morally wrong; cannot make something lawful which in its very nature is abhorrent to law and decency.

III

Finally, we must take issue with the Court's conclusion that some "spying" on the part of the Federal Communications Commission, having for its purpose the detection of law violation, is implicit in the Communications Act. Nowhere can we find any authority in the Commission spelled out directly or indirectly in

the Commission to police for profanity. Indeed, the prohibition against use of indecent language has been lifted out of the Act and transferred to Title 18, Chapter 71. Nowhere is there any indication that obscenity by radio communication is to be policed in any fashion different than obscenity by mailing obscene matter condemned by Section 1461, Chapter 71, Title 18 U.S.C.A.

Does the Post Office Department have the right to "sample" private mailings to see if perchance some obscene matter is to be found therein? By the same line of reasoning as the Court applies to radio communication we reach the unhappy conclusion that our postmaster or letter carrier has carte blanche to open and read our most private correspondence on a "night ride" for obscenity in the mails. True it is that Section 303 (D) authorizes the Commission to revoke the operator's license of one transmitting obscene words but so does Section 259a, Chapter 6, Title 39 U.S.C.A. (1954 Cum. Pocket Part) authorize the Postmaster to exclude from the mails obscene solicitation matter and Section 1461, Title 18 declares nonmailable obscene matter "shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

A careful reading of the Act, particularly Section 303 thereof "Powers and Duties of the Commission" read in the light of Section 326 denying the power of censorship to the Commission and preserving the right of free speech, discloses a careful intent upon the part of our Congress to deny the Commission such authority. If it was intended the Commission should spy for law infractions why did not the Congress authorize the Commission to revoke the operator's license of a person found by it to be engaged in such nefarious activity—it authorized such action in particular instances and for particular infractions—Section 303, (A) through (F)—but clearly negatives the thought it was creating a super police state within our land insofar as radio communication is concerned with a lawful ear in the "key hole" of every operator of a radio transmitter, so long as the ear be placed there under the guise of

listening for profanity or obscene matter. Certainly if the Commission can lawfully wire tap to detect obscenity or to ascertain that the station is upon its assigned frequency, it can disclose what is thereby lawfully learned. The language of Section 605 discloses no such intent upon the part of the Congress, for the few instances in which disclosure is permitted are carefully spelled out.

While the Court holds that spying by the Federal Communication Commission is unlawful if the operator of the transmitting equipment is licensed, it also holds in effect that spying at the behest of the Department of Justice for the purpose of gathering evidence in a criminal case is lawful if by chance the operator of the transmitter is unlicensed even though the Federal Communications Commission did not know the operator was unlicensed and the alleged criminal matter under investigation was unrelated to the functions of the Federal Communications Commission.

We respectfully urge that the technical and innocent oversight of appellees in failing to properly fill out a form for a "perfunctory" license does not make them "outlaws of the ether highways", shorn of all the rights of a citizen of the United States, to be shot on sight by the Federal Communications Commission stalking them, not as unlicensed operators of communications equipment and for that delinquency, but in cooperation with the Department of Justice and the Immigration Service for the claimed offense of concealing aliens—a matter generally accepted as somewhat beyond the jurisdiction of the Federal Communications Commission.

CONCLUSION

We seriously and urgently represent to the Court that a rehearing should be ordered.

Respectfully submitted,

SNELL & WILMER

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Attorneys for Appellees

CERTIFICATE OF COUNSEL

I, Mark Wilmer, counsel for the above named Robert V. H. Sugden and Jean S. Sugden, appellees, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Mark Wilmer

Counsel for Robert V. H. Sugden and Jean S. Sugden, *Appellees*